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No. 06-1248

In the Supreme Court of the United States

COLISEUM SQUARE ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

ALPHONSO JACKSON, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Housing and Urban Development's decision to fund a revitalization project after preparing an environmental assessment and issuing a finding of no significant impact was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 465 F.3d 215. The orders of the district court (Pet. App. 52a-67a, 68a-78a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2006. A petition for rehearing was denied on December 13, 2007 (Pet. App. 79a). The petition for a writ of certiorari was filed on March 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to "include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on * * * the environmental impact of the proposed action." 42 U.S.C. 4332(2)(C)(i). NEPA is a procedural statute that does not mandate substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). It is designed "to insure a fully informed and well-considered decision." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

Implementing regulations issued by the Council on Environmental Quality (CEQ) provide that an agency may prepare an environmental assessment (EA), which is a "concise public document" that briefly describes the need for, alternatives to, and environmental impacts of the proposed federal action. 40 C.F.R. 1501.3, 1508.9. If the agency determines, based on the EA, that the proposed federal action will not significantly affect the environment, it can discharge its NEPA duties by making a finding of no significant impact. 40 C.F.R. 1501.4(e), 1508.13. If, however, the agency determines that the proposed action will significantly affect the environment, it must prepare a more thorough environmental impact statement (EIS) concerning the project. See 40 C.F.R. Pt. 1502.

2. The St. Thomas Housing Development (St. Thomas) was a 1510-unit public housing project located in the Lower Garden District of New Orleans. Pet. App. 6a-7a. In the early 1990s, St. Thomas was excessively run-

down and crime-ridden. The Housing Authority of New Orleans (HANO) applied for a Homeownership and Opportunity for People Everywhere (HOPE VI) grant from the United States Department of Housing and Urban Development (HUD) to revitalize St. Thomas. In 1996, HUD awarded HANO $25 million of HOPE VI funds for the St. Thomas project. *Ibid.*[1]

As with other HOPE VI projects, the goals of the St. Thomas revitalization included decreasing the concentration of poverty, ending the social and economic isolation of residents, leveraging non-federal resources to enable the housing authority to house more people, and making community social service training programs more available to residents. A.R. 2617. To further those goals, HANO's application for federal funds proposed creating a mixed-income community by renovating some of St. Thomas's existing units and constructing new rental and home-ownership units. Pet. App. 7a.

In 1998, HANO enlisted the help of a private developer, Historic Restorations, Inc., to assist in improving the plan. Pet. App. 7a. In 2000, HANO submitted an amended revitalization plan to HUD for approval. *Ibid.* The amended plan focused on new construction so the site could be reconfigured to match the lower population density design of the surrounding Lower Garden District. HANO reasoned that the new plan would be both more efficient to implement and safer for residents upon completion. A.R. 1366. HANO also proposed including a 275,000 square-foot retail center on nearby abandoned industrial land; the retail component was added to sup-

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[1] HOPE VI is a federal public housing funding program that gives grants to local housing authorities to revitalize distressed public housing. See A.R. 2617; 42 U.S.C. 1437*l* (1994). The court of appeals' opinion transposes the letters in the Roman numeral.

ply residents with jobs, goods, and services and to buffer the residential units from the Tchoupitoulas Street industrial corridor. Pet. App. 7a; A.R. 1366.

Several years of internal and public review of the environmental and historic property impacts of the St. Thomas revitalization project preceded the decision to go forward with the project, including review under NEPA and the National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.* Pet. App. 7a-9a. Numerous public meetings were held to address issues connected to the St. Thomas revitalization project. The retail development was scaled down from the initial proposal of 275,000 square feet to 199,000 square feet and Wal-Mart was selected as the retailer. *Id.* at 8a.

After its initial NEPA review of the project, HUD reopened its NEPA process to further study the project. Pet. App. 9a. HUD considered and analyzed public comments and project alternatives. On February 20, 2003, HUD completed an EA, determined that it was not necessary to prepare an EIS, and issued a finding of no significant impact. A.R. 1-12. The EA evaluated many categories of potential impacts from the project, including noise, environmental justice, zoning, economic effects on nearby businesses, historic preservation, toxic and hazardous waste, lead contamination, traffic, and cumulative impacts from other nearby projects. Pet. App. 23a-24a, 28a-29a, 75a.

3. Petitioners filed this lawsuit, alleging violations of NEPA and NHPA. The district court granted in part HUD's motion for summary judgment. Pet. App. 68a-78a. With respect to petitioners' NEPA claims, the court held that, "[h]aving reviewed the administrative record," HUD's EA and finding of no significant impact were not "arbitrary and/or capricious in any respect."

Id. at 75a. The district court observed that the administrative record reveals that HUD evaluated all of the issues raised by petitioners, and "[a]lthough HUD relied on experts with whom [petitioners] disagree, and reached conclusions that conflict with [petitioners'] opinions," those were "not valid grounds for vacating HUD's decision." *Id.* at 75a-76a. The district court subsequently dismissed as moot petitioners' remaining claims. *Id.* at 52a-67a.

4. A unanimous panel of the court of appeals affirmed. Pet. App. 1a-51a. As an initial matter, the court concluded—based on supplemental briefs it requested at oral argument—that the case was not moot. *Id.* at 9a-11a. The court observed that "many significant parts of the project have been completed," including the Wal-Mart shopping center, which has been open for business since late 2004, and many of the housing units. *Id.* at 9a. The court nevertheless concluded that petitioners' claims were not moot because "significant projected construction and renovation remain unfinished." *Id.* at 10a.

The court of appeals then conducted an extensive review of the record and explained in detail its conclusion that HUD had not acted arbitrarily or capriciously with respect to each of petitioners' asserted deficiencies in HUD's NEPA review. Pet. App. 17a-35a. The court of appeals discussed, *inter alia*, petitioners' concerns with respect to noise, environmental justice, zoning changes, businesses occupying historic properties, toxic and hazardous waste, lead contamination, traffic, cumulative impacts, mitigation and context, and intensity. *Ibid.* The court concluded that petitioners "failed to demonstrate in any instance that HUD acted arbitrarily, capriciously, or contrary to the law in deciding that the

project did not cause significant effects to human environment." *Id.* at 35a.[2]

ARGUMENT

The court of appeals' decision is based on a factbound application of the standard of review under the Administrative Procedure Act (APA): that the agency's decision not to prepare an EIS should be set aside only if arbitrary, capricious, an abuse of discretion, or contrary to law. That standard is applied by every circuit to consider the issue since this Court's decision in *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989). Applying that standard, the court of appeals correctly concluded that HUD did not act arbitrarily or capriciously when it decided not to prepare an EIS for its funding of the St. Thomas project. Further review is not warranted.

1. In *Marsh*, this Court held that the APA's arbitrary-or-capricious standard of review applies to an agency's decision not to prepare a supplemental EIS, which this Court likened to the decision whether to prepare an EIS in the first instance. 490 U.S. at 374-376. This Court also has emphasized that the reviewing court should "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment," a standard of review that is ultimately "a narrow one." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971)

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[2] The court of appeals also rejected petitioners' claims that federal regulations required the preparation of an EIS under the circumstances here (Pet. App. 12a-17a), that HUD arbitrarily and capriciously concluded that the project would result in no adverse effects to historic properties under the NHPA (*id.* at 35a-40a), and that the district court incorrectly resolved various motions (*id.* at 40a-51a).

(*Overton Park*). Thus, a reviewing court "is not empowered to substitute its judgment for that of the agency." *Ibid.*

Here, the court of appeals correctly stated the appropriate standard of review, and it properly applied that standard to the facts of this case. As the court recognized, "[a]n agency's decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Pet. App. 11a (quoting 5 U.S.C. 706(2)(A)). And, in a straightforward application of *Marsh* and *Overton Park*, the court analyzed whether "HUD acted reasonably and in accordance with law in deciding, based on its EA and [finding of no significant impact], that its action had no direct or indirect effects that significantly affected the quality of the human environment." *Id.* at 12a.

Petitioners' claim that the court applied an inappropriate standard of review is unfounded. Petitioners contend that the court applied a standard that requires a plaintiff challenging an agency's decision not to prepare an EIS to "show that the project will, in fact, cause significant effects on the human environment." Pet. 16. In support of that contention, petitioners state that the court "posed the legal question as whether 'HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project *would* significantly affect the quality of the human environment.'" Pet. 6-7 (emphasis added by petitioners) (quoting Pet. App. 17a). But that statement by the court of appeals was merely its re-statement of petitioners' argument; it was not the court's formulation of the applicable standard of review. See Pet. App. 17a

("*The theme of plaintiffs' remaining NEPA arguments is that* HUD acted arbitrarily, capriciously, or in abuse of its discretion by failing to prepare an EIS although it knew or should have known that the reasonably foreseeable effects of the project would significantly affect the quality of the human environment.") (emphasis added).

Moreover, the court's careful analysis of specific aspects of the project belies petitioners' suggestion (Pet. 16, 20-24) that the court of appeals required them to demonstrate that the project would "in fact" have significant environmental effects. With respect to the local zoning changes (Pet. 20-22), the court rejected petitioners' argument that such changes constitute a significant environmental impact that automatically requires preparation of an EIS. Pet. App. 20a-21a. Based on the facts of this case, the court correctly concluded that petitioners had not demonstrated that HUD acted arbitrarily or capriciously in determining that the zoning changes did not cause such an impact. *Ibid.* The court observed that the Wal-Mart and the high-rise structures are located in an industrial corridor and that the remaining residential units bordered the nearby residential areas. *Id.* at 21a. In so holding, the court expressly distinguished the facts here from those in one of the cases on which petitioners rely, *Sierra Club* v. *Marsh*, 769 F.2d 868 (1st Cir. 1985). See Pet. App. 20a-21a. There, the First Circuit addressed a "radical[]" change of "replacing an undeveloped wooded island with a marine terminal and industrial complex," which the court determined necessitated an EIS. *Marsh*, 769 F.2d at 872.

With respect to the effects Wal-Mart might have on other retailers (Pet. 22-23), the Fifth Circuit did not require, as petitioners contend (see Pet. 16), a showing that a significant environmental impact was a certainty.

Rather, the court rejected petitioners' argument that HUD had to study cumulative impacts from other national retailers following Wal-Mart to the area, reasoning that such a consequence was not "reasonably foreseeable." Pet. App. 29a. The court examined the evidence offered by petitioners and concluded that their argument was supported only by "broad statistical data discussing general national trends" and that they had offered "nothing concrete to suggest that such changes will likely occur" in the area. *Ibid.* Thus, the court concluded that any harm to the environment based on that evidence was "highly speculative" and thus not reasonably foreseeable. Contrary to petitioners' suggestion (Pet. 22-23), rejecting petitioners' evidence as highly speculative is not the same as requiring petitioners to demonstrate that significant environmental impacts will certainly occur. See *Marsh*, 769 F.2d at 878 ("Of course, agencies need not consider highly speculative or indefinite impacts.").

Petitioners also point to the court of appeals' reasoning with respect to their NHPA claim to support their claim of a circuit conflict on the appropriate standard of review for NEPA claims. Pet. 23-24 (citing Pet. App. 40a). In rejecting petitioners' NHPA claim, the court of appeals concluded (Pet. App. 40a) that HUD had reasonably relied on the National Park Service's opinion that the project would have no (let alone significant) adverse impact on National Historic Landmarks. Even assuming that that conclusion related to the standard of review the court of appeals applied to petitioners' NEPA claims (see *id.* at 34a), that conclusion was fully supported by the record.

2. Contrary to petitioners' assertion (Pet. 10), there is no "longstanding and pervasive circuit disagreement"

on the standard of review applicable to an agency's decision not to prepare an EIS. As *Marsh* instructed, all of the circuits to consider the issue, including the seven circuits cited by petitioners (Pet. 10 nn.7-8), apply the APA's arbitrary-or-capricious standard of review. See *Marsh*, 769 F.2d at 870-871; *National Audubon Soc'y* v. *Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997); *Society Hill Towers Owners' Ass'n* v. *Rendell*, 210 F.3d 168, 178-179 (3d Cir. 2000); *Ocean Advocates* v. *United States Army Corps of Eng'rs*, 402 F.3d 846, 858-859 (9th Cir. 2005); *Greater Yellowstone Coal.* v. *Flowers*, 359 F.3d 1257, 1274 (10th Cir. 2004) (*Greater Yellowstone*); *Hill* v. *Boy*, 144 F.3d 1446, 1450 (11th Cir. 1998); *Sierra Club* v. *Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983). Indeed, it is telling that no circuit actually recognizes the "long-standing and pervasive circuit disagreement" (Pet. 10) petitioners posit, and that petitioners did not raise the issue on petition for rehearing and did not seek review from the en banc court.

As petitioners note (Pet. 13-16), several circuits have inquired, when considering whether an agency acted arbitrarily or capriciously in deciding not to prepare an EIS, whether there is a "substantial possibility" of significant environmental effects. Whatever the merit in that inquiry as part of a court's application of the arbitrary-or-capricious standard, this Court's review is not warranted because, as explained above, the court here did not review HUD's decision in a manner that is in conflict with that formulation. Nor, as explained below, do the decisions of the Third and Tenth Circuits relied on by petitioners create the conflict petitioners suggest. Pet. 16-18 (citing *Society Hills Towers Owners' Ass'n*, *supra*, and *Greater Yellowstone*, *supra*).

The plaintiffs in *Society Hill* challenged HUD's approval of a grant to the City of Philadelphia for a downtown hotel and parking garage after preparing an EA and determining that the project did not require an EIS. 210 F.3d at 172-173. The Third Circuit considered in some detail the appropriate standard of review, and determined that this Court's decision in *Marsh* required it to apply the APA standard. *Id.* at 178-179. Applying that standard, the court rejected the plaintiffs' argument that the EA had failed to consider the cumulative impacts caused by the project combined with a possible future entertainment complex the city had proposed. *Id.* at 180-182.

The Third Circuit concluded that the entertainment complex was not a sufficiently concrete proposal to require an analysis of its possible cumulative impacts with the proposed hotel and parking project. *Society Hill*, 210 F.3d at 180-182. In reaching that conclusion, the court relied on this Court's decision in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.20 (1976), and decisions from several other courts of appeals (including ones that petitioners posit are on the other side of the alleged conflict). Those decisions emphasized that "[NEPA] does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." See, *e.g.*, *ibid.* In the alternative, the Third Circuit concluded that, even if the entertainment complex were certain to be completed, the two projects were "not sufficiently interdependent" to require analysis of both when approving the hotel and parking project. *Society Hill*, 210 F.3d at 182.

Petitioners rely on the Third Circuit's statement that it was "not at all *certain* that the proposed 'mega' enter-

tainment complex or any of the projects included in the planning documents [would] ever be completed," Pet. 17 (emphasis and alteration added by petitioners) (quoting *Society Hill*, 210 F.3d at 182), to suggest that the Third Circuit requires a plaintiff to show that the project "will, in fact, cause significant effects on the human environment" before an agency is required to prepare an EIS. Pet. 16-17. Read in context, however, it is clear that the Third Circuit did not *sub silentio* establish a new standard of review for decisions not to prepare an EIS. Instead, the court simply concluded that the entertainment complex was a "less imminent action[]" that need not be studied in conjunction with the proposed hotel and parking project, as contemplated by *Kleppe* (427 U.S. at 410 n.20) and numerous decisions from other courts of appeals. That conclusion is also tempered by the court's alternate holding that, even if the entertainment complex were certain to be built, NEPA still did not require HUD to examine its effects because the projects were not interdependent. See *Society Hill*, 210 F.3d at 182.

The Tenth Circuit's decision in *Greater Yellowstone* is a similarly straightforward application of the APA's arbitrary-or-capricious standard and likewise of no aid to petitioners. There, the court considered whether the Army Corps of Engineers was required to prepare an EIS before issuing a permit allowing a housing development and golf course. 359 F.3d at 1262. The Tenth Circuit—just like the Third Circuit in *Society Hill* and the Fifth Circuit here—determined that the appropriate standard of review is the APA's arbitrary-or-capricious standard. *Id.* at 1274.

The court then considered whether, among other things, alleged potential impacts to bald eagles required

the Corps to prepare an EIS. The court noted that although the impacts to bald eagles were uncertain, that uncertainty "stemmed not from a lack of thoroughness in investigating potential impacts" but from the difficulty in predicting individual eagle responses because "eagle behavior varies greatly among individuals and by circumstance." *Greater Yellowstone*, 359 F.3d at 1276 (internal quotation marks omitted). The court concluded, given that uncertainty, that the Corps' required mitigation measures "'constitute an adequate buffer' against adverse impacts to bald eagles so as to 'render such impacts so minor as to not warrant an EIS.'" *Ibid.* (quoting *Wetlands Action Network* v. *United States Army Corps of Eng'rs*, 222 F.3d 1105, 1121 (9th Cir. 2000), cert. denied, 534 U.S. 815 (2001). The Tenth Circuit thus concluded that the Corps did not act arbitrarily or capriciously in deciding not to prepare an EIS. *Id.* at 1277.

Petitioners contend that the Tenth Circuit held that an EIS is not required if the impacts are uncertain or if the plaintiffs have not shown that the action will "definitely significantly affect" the environment. Pet. 18. But the Tenth Circuit's decision in *Greater Yellowstone* expressly concluded that the mitigation rendered any impacts to bald eagles too minor to warrant an EIS. The "uncertainty" of impacts to individual eagles was therefore resolved by the mitigation, 359 F.3d at 1276-1277; contrary to petitioners' contention (Pet. 18), the court did not hold that the uncertainty was itself "sufficient to support the Corps' decision not to prepare an EIS."

3. In any event, this case would not present an appropriate vehicle for resolving the question presented. While this litigation has been pending, HANO has con-

tinued demolition and construction associated with the St. Thomas project. As the court of appeals recognized (Pet. App. 9a), HANO has completed substantial portions of the revitalization—including the Wal-Mart, which is operational, and many of the housing units, which are occupied. As of February 2006, most of the federal funding that triggered the requirement of environmental review had been disbursed. See Gov't C.A. Supp. Letter Br. 3-5 (noting that, as of that date, HUD had authorized the release to HANO of $22,352,516, or over 88%, of the challenged $25 million HOPE VI grant) (citing Riddel Decl. para. 4).

As noted above, NEPA is a procedural statute that does not mandate substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Thus, even if the Court were to grant review and conclude that HUD's NEPA analysis was inadequate, the proper course would be for the Court to remand the case to the agency to redetermine whether an EIS needs to be prepared. See, *e.g.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (where a reviewing court concludes that an agency's analysis is defective, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"). By that time, no meaningful relief would result from HUD doing further environmental review of any remaining expenditure of federal funds for this local project. For this reason also, this case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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